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No. 83-823

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

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CLACKAMAS COUNTY HOUSING  
AUTHORITY, RALPH GROENER,  
ROBERT SCHUMACHER, JONO D.  
HILDNER,

Petitioners,

v.

WALLACE M. TELFORD,

Respondent.

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ON A PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, for the reasons set forth  
herein, respectfully request this Honorable  
Court deny the Petition for Writ of Cer-  
tiorari to the United States Court of

Appeals for the Ninth Circuit.

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### REASONS FOR DENYING THE WRIT

Rule 17 of the United States Supreme Court Rules sets forth the considerations of this court governing review on certiorari. Respondent contends that none of these considerations are encountered in the Petition for a Writ of Certiorari herein.

The United States Court of Appeals for the Ninth Circuit did not render a decision in conflict with the decision of another federal court of appeals on the same matter. [United States Supreme Court Rule 17.1(a)].

Petitioners fail to state clearly the points requiring consideration when they fail to distinguish those rules which determine when a government agency acts in its governmental or proprietary capacity from Respondent's position as an employee

of a government agency. [United States Supreme Court Rule 21.5].

The United States Court Of Appeals For The Ninth Circuit Did Not Render A Decision In Conflict With Other Courts Of Appeals As To The Governmental Or Proprietary Nature Of Functions Of A Government Agency

Respondent brought suit against the petitioners alleging they had breached an employment contract for a term of years. Petitioners now frame the controlling issue in terms of whether petitioner Clackamas County Housing Authority was acting in its governmental or proprietary capacity when it entered into its contract with Respondent.

Petitioners claim the opinion of the Court of Appeals for the Ninth Circuit in Telford v. Clackamas County Housing Authority, 710 F 2d 567 (9th Cir. 1983), is in conflict with the Second Circuit's opinion in Clain v. City of Burlington, 202 F 2d 532 (2nd Cir. 1953), the Fifth Circuit's

opinion in Imperial Production Corp. v. City of Sweetwater, 210 F 2d 917 (5th Cir. 1954), and the Fourth Circuit's opinion in Hitchings v. Albemarle Hospital, 220 F 2d 716 (4th Cir. 1955). Unlike the case at bar, which concerns contract law, each of the three latter cases addressed the question of whether the public body was acting in its governmental or proprietary capacity in the context of a tort suit. If the government agency was acting in its governmental capacity, it would enjoy sovereign immunity from the negligent acts of its agents; however, if the agency was acting in its proprietary capacity, no immunity would lie.

In Clain, the court noted the history of the governmental/proprietary distinction and the doctrine's close relation to government's increasing involvement in the supply of nonessential services. The court wrote that:

\* \* \* as time went on, villages and cities began more and more to dispense to their residents for pay services that individuals had theretofore supplied--so far as they had existed at all \* \* \* ; and the courts began to think it unreasonable to treat such activities as though they were the same as the older and more vital services of protection against violence and fire, maintenance of highways, and the like. Injuries done to an individual in performing such functions were so like the same services, performed by "public utility" corporations, that it seemed intolerable not to treat recoveries for the negligent exercise of the powers granted as a cost of the services rendered. Thus arose a distinction between "governmental," and "proprietary," activities," \* \* \*. 202 F 2d at 533.

The court went on to find that making the streets safe for travel was an essential governmental function. Yet the court's analysis suggests they would find, as did the Ninth Circuit, that Respondent performed proprietary duties. In Telford, the court described Respondent's duties as follows:

A part of Mr. Telford's contract called for broad duties in general terms. He was to be the public representative of the Housing Authority and was to enforce adopted management policies. Telford had no authority to make policy, however. He only carried out policies set by Housing Commissioners. Telford's specific contractual duties were identical to those that would be provided by a private corporation or a private landlord. He operated the Housing Authority for a profit, he paid bills, collected rents, maintained records, reviewed tenant applications, interviewed and selected tenants. [citations omitted]. These are proprietary or corporate functions. Telford's contractual duties did not fall within the class of governmental functions in any substantial part. 710 F 2d at 571 [emphasis added].

Respondent's duties as a landlord do not rise to the level of "vital services" which compelled the Second Circuit, in Clain, to hold that maintenance of the public way in a safe condition was a governmental, rather than proprietary, function.

In Imperial Production Corp. v. City of Sweetwater, supra, the municipal body conceded that, in the absence of any state statute, the operation of an airport is a proprietary act of a municipality. 210 F 2d at 918. The circuit court felt constrained by the Municipal Airport Act of the State of Texas, Article 46d, Sec. 15, Revised Civil Statutes of Texas, Vernon's Ann.Civ. St., to find that the city's operation of the airport was a governmental function. The statute found controlling in Imperial Production Corp. provided that that "\* \* \* operation, regulation, protection and policing of airports \* \* \* are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity \* \* \*." Art. 46d-15, Vernon's Ann. Civ.St.

The enabling statutes for a local

housing authority in the State of Oregon are significantly more broad and unrestricted than the Texas statute at issue in Imperial Production Corp. Oregon Revised Statutes Sec. 456.120 provides that "[a]n authority shall constitute a public body corporate and politic, exercising public and essential governmental functions, and having all the powers necessary or convenient to carry out and effectuate the purposes" of the Act. [emphasis added].

While the Texas statute could easily be read as a legislative attempt to limit the risk assumed by a municipality in the operation of an airport, particularly in light of the inherent danger of operating aircraft, the Oregon statute expressly provides that a housing authority shall be vested with both corporate (meaning "proprietary") and politic (meaning "governmental") powers. This difference between the statutes is fundamental; the

Texas statute is so dissimilar that the Fifth Circuit opinion cannot be held as dispositive of the within cause. On the contrary, the Oregon legislative scheme, by its terms, contemplates that the petitioning Housing Authority will, as the need arises, exercise proprietary powers. Had the Oregon Legislature desired to cloak the Housing Authority in a veil of immunity, as Petitioners now assert, it would have done so by statute. The Ninth Circuit did not controvert any Oregon statute when it determined Respondent performed proprietary duties. The panel expressly found that Respondent's contract with the Housing Authority "violated no statutes." 710 F 2d at 572.

In Hitchings v. Albemarle Hospital, supra, the circuit court was faced with a negligence action against a hospital operated by a municipality. Although no cases on point were found, the court

followed a "distinct tendency" in the North Carolina decisions to grant immunity in such cases. They went on to note that it is the general rule in that jurisdiction to disallow liability unless allowed by statute. In the case at bar, the Housing Authority's enabling legislation clearly states that it may act in a proprietary capacity.

It is significant to note that in all three cases relied on by Petitioners, Clain, Imperial Production Corp., and Hitchings, the individual circuit courts felt obliged to follow state law on the substantive issue. The question of when an Oregon government body is acting in a governmental, rather than proprietary, fashion is one peculiar to the laws of Oregon. It does not present a federal question where reference to the decisions of other circuits would be helpful. Nor would other circuits have the need to

reach the issue. Having raised an issue unique to the laws of Oregon, Petitioners have failed to bring their Petition for a Writ of Certiorari within the provisions of Supreme Court Rule 17.

**Petitioners Fail To Distinguish  
The Rules Applicable To A Govern-  
ment Agency From Those Applicable  
To An Employee Of A Government  
Agency**

Petitioners cite Miles v. City of Baker, 152 Or 87, 92-93, 51 P 2d 1047 (1935), for the proposition that a government body cannot contract for a governmental function for a period longer than the government body's term of office. The focus is on the work to be done under the contract. In their Petition, Petitioners focus on the work to be done by the government body itself.

The circuit court correctly ruled that the Housing Authority's Board of Housing Commissioners exercised

"all of the powers and duties" vested in the Housing Authority by statute. Telford, 710 F 2d at 570. The circuit court also correctly ruled that Respondent's powers and duties were determined solely by the Housing Commissioners and created by contract. Ibid. Petitioners' authority concerns the capacity of a municipality in the operation of an airport and a hospital, and in providing for safe passage on the public way; at no time do these cases concern the capacity of an employee of a government agency.

The trial court held that Respondent was hired to perform governmental functions because his duties further the statutory functions of the Housing Authority to provide safe and sanitary housing for persons of lower income. Carried to its logical conclusion, this rule would mean every employee of the Housing Authority, both clerical and custodial, would be

hired to perform government functions, effectively barring them from any employment security. The Ninth Circuit's reversal of this ruling should be allowed to stand.

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CONCLUSION

Respondent respectfully requests this court to deny the Petition for Writ of Certiorari.

Dated: December 13, 1983.

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